United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1273

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES ex rel. SEBASTIAN ROSSILLI,

Relator-Appellant,

- against -

J. LaVALLEE, WARDEN,

Respondent-Appellee.

- X

Docket No. 74-1273

APPELLANT'S BRIEF

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Preliminary Statement

This is an appeal from a judgment of Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York. Chief Judge Mishler's opinion, which appears in the Appendix (A5-A16)* has not been reported.

Statement of the Issue Presented for Review

In a criminal trial of appellant in a state court the testimony of a witness given at a preliminary hearing was

*Numbers in parentheses preceded by "A" are citations to pages of the Appendix.

read in evidence, the court having found in a due diligence hearing that the witness was missing at the time of the trial. Were appellant's federal constitutional rights violated so as to entitle him to habeas corpus when it appeared that the search for the witness had been unskilfully and perfunctorily conducted and that thereafter the witness claimed he had never been missing?

The District Court refused to consider the evidence that the witness had not been missing, on the ground that it did not meet the requirements for newly-discovered evidence, and held that the evidence of the search presented at the due diligence hearing was sufficient to support introduction of the recorded testimony. It accordingly held that appellant's constitutional rights had not been violated.

Statement of the Case

The Nature of the Case and the Proceeding Below

This case began as an application pro se by appellant to the United States Court for the Eastern District of New York to secure his release by habeas corpus from confinement in a New York State prison under judgment of a New York State court.

His application was denied by then Chief Judge Zavatt, and he sought leave to appeal in forma pauperis. (A35). This Court granted leave and assigned me as counsel on the appeal.

Before the appeal came on to be heard, I learned that appellant had begun a coram nobis proceeding in the State Court where he had been convicted, based on newly-discovered evidence. Inasmuch as the appeal pending could be affected by the outcome of the coram nobis proceedings, this Court remanded the case to the District Court to await the outcome of those proceedings, with leave to move to introduce the newly-discovered evidence. (A36).

Appellant's application for coram nobis was determined against him, and he exhausted his remedies in the State courts (A38-A39). I then moved in the District Court for leave to introduce the newly-discovered evidence and for a writ of habeas corpus in accordance with his previous motion (A33-A34). This motion came on before Chief Judge Mishler in July 1973 (A3), and on November 30, 1973 he denied the application and dismissed the petition for habeas corpus (A4).

I filed a notice of appeal, and this Court again granted a certificate of probable cause and appointed me as counsel for appellant.

This appeal brings up for review the decisions of Chief Judge Zavatt and Chief Judge Mishler.

Statement of the Facts

On the morning of January 11, 1965 a robbery was committed in a house in Nassau County (A5). The robbers hurriedly left the house and ran past one William Brown, who was at the door. They ran down the street and were observed cursorily by three boys (A6).

Appellant Rossilli was thereafter apprehended and, at a preliminary hearing on February 5, 1965 was identified by William Brown as one of the men who ran past him from the house (A6).

In January 1967 appellant was tried for robbery and assualt in County Court, Nassau County (A5). The three boys testified, but their identification of appellant was inconclusive (A9, A36-A37). Appellant presented alibi evidence (A37). The lady of the house which was robbed was unable to identify anyone. Her maid, who was in the house at the time, could not be found to testify at the trial.

There does not seem to have been any disagreement in the proceedings below and in the State courts that the testimony which resulted in appellant's conviction was that of William Brown. This testimony, however, was not given by Brown from the witness stand, but was the transcript of his testimony at the preliminary hearing of February 1965 (A9). This transcript was read after it had been represented to the trial court that Brown was unavailable and after the court had conducted a hearing to determine whether the prosecution had used due diligence to locate Brown. The court ruled that due diligence had been shown, and the transcript was admitted (A7-A9). Conviction followed, and appellant was sentenced to imprisonment for from 18 to 30 years (A5).

Appellant's trial had originally been scheduled for May and then for September 1965 and the prosecution served subpoenas on Brown at those times, at the address where he was working (A7). In 1966, however, the prosecution's detectives and investigators reported their inability to find Brown (A8-A9). An address in the Bronx, 835 Trinity Avenue, was found where Brown was said to live, and some inquiry was made there in January 1967, and a Mrs. Brown was located who said that her husband had not lived with her since October 1965 as

a result of marital problems (A8,A55). A Mary Brown, who was not a relative of William Brown, but who said she knew him, said in response to a phone call that she had not seen William Brown for 3 months (A56).

The newly-discovered evidence was found in 1971 after appellant's wife had saved enough money to hire a private investigator (A50-A51). He discovered the William Brown in question living with his wife at the Bronx address where the prosecution's investigators had claimed they had tried to find him (A51). He and his wife submitted affidavits to the effect that in January 1967 he was in Florida in connection with his employment, but that his wife knew his whereabouts and that there had not been marital troubles between him and his wife (A41, A44). Mrs. Brown stated that a detective from Nassau County had contacted her while her husband was in Florida and that she had told him her husband was in Florida. Mrs. Brown also pointed out that another Mr. and Mrs. William Brown lived in the adjoining building, 837 Trinity Avenue, which is physically connected to 835 Trinity Avenue (A44).

No affidavits controverting the affidavits of Mr. and Mrs. Brown were submitted. The state argued that the due

diligence hearing conducted at the time of the trial was constitutionally sufficient.

Chief Judge Mishler first held that the Brown affidavits did not constitute newly discovered evidence,

> "since petitioner had the opportunity to discover it when Brown's address in the Bronx was revealed at the due diligence hearing on January 17, 1967.
>
> "Petitioner's claim of being denied this evidence through lack of funds is specious. A subway ride to Brown's residence in the Bronx would have given him everything he learned in Mary Brown's affidavit of April 15, 1972, and everything he knows now." (A12-A13)

The Court ruled on the subject of due diligence (A15):

> "The test. . . is not whether Brown was actually residing at an ascertainable location, but whether the state, acting in good faith, made a reasonable effort to find Brown and to produce him at the trial. The reasonableness of the state's effort must be determined in light of the facts as they existed at the time of the trial, not in light of subsequent events."

POINT I

Appellant Has Exhausted His State Remedies

Appellant's coram nobis proceedings were carried as far within the state system as state law permitted. Appellant was not bound to petition the Supreme Court of the United States for certiorari. Fay v. Noia, 372 U.S.391, 435-8 (1963); Makarewicz v. Scafati, 438 F.2d 474 (1st Cir.), cert. denied, 402 U.S. 980 (1971); Hedberg v. Pitchess, 362 F. 2d 511 (9th Cir.1966). The federal habeas corpus proceeding was properly commenced.

POINT II

The Evidence Is Newly Discovered

Fed.R.Civ.P. 60(b) authorizes the granting of a new trial for newly-discovered evidence. The evidence sought to be introduced here constitues newly-discovered evidence. United States v. Rutkin, 208 F.2d 647, 649 (3d Cir.1954); Johnson v. United States, 32 F.2d 127, 130 (8th Cir.1929). The District Court erred in holding that it was not.

The "diligence" referred to in the cases "is a relative term and depends upon the circumstances of the case" and

means no more than ordinary diligence. United States v. Gordon, 246 F.Supp. 522, 525 (D.D.C.1965). It may also well be that the requirement of diligence is of reduced significance where constitutional questions are involved. Marshall v. United States, 436 F.2d 155, 158-9 (D.C. Cir. 1970).

The evidence is not cumulative nor does it merely raise questions of the credibility of a witness. Instead, it is the most direct evidence about the presence or absence of the allegedly missing witness, emanating as it does from the witness himself and his wife.

The prosecution had had no difficulty locating William Brown in 1965 (A54), but when his presence was sought in 1966 and in January 1967, he was not to be found, the court was told, although four men went out looking for him. Proof by the witness and his wife that at the time of the trial he was still in residence at his old address and was available, even though his work sometimes took him out of the city, and that he had not disappeared because of marital troubles, as had been intimated, would cast the gravest doubt on whether the prosecution had used due diligence. Neither William Brown nor his wife had any relationship with appellant

and there is nothing to show that they have any interest in the case.

The District Court took the position that the evidence was not newly-discovered because William Brown's home address was revealed at the hearing in January 1967 and appellant could have taken the subway to the Bronx and hunted down Brown himself (A12-A13). The District Court has involved itself in logical contradictions here. At the time of the due diligence hearing, appellant had no reason to assume that the statement of the prosecution's witnesses were erroneous. If a detective testified that he could not find Brown at his given home address, appellant was not duty bound to think he could do any better by himself.

More important, however: to the extent that appellant should have been able to find Brown in January 1967, to at least the same extent the prosecution's investigators and detective should have been able to find him, and their failure to find him emphasizes their lack of due diligence.

The affidavit of Mary Brown (A44) stated that she was contacted by a Nassau County detective while her husband

was in Florida and that she told him that he was there in connection with his work. The District Court regarded this as reinforcing rather than detracting from the finding made in the state court (A15 n.7). With all due respect, the conclusion should be the exact opposite: this contact and conversation were never reported to the state court at the due diligence hearing. Instead, there was evidence of contact with a Louise Brown, whose husband had left her and was unavailable (A8). The inference is permissible -- and the District Court should have held a hearing to explore it -- that evidence of the location of William Brown was available to representatives of the prosecution but was suppressed. If this were so, appellant's rights were most seriously violated.

POINT III

The Prosecution Did Not Use Due Diligence in Attempting to Locate William Brown

The case at bar seems to be the only one in which an allegedly missing witness appears after the trial and claims that he was never missing. In all cases in which the previous testimony of a missing witness has been held admissible, the witness has indeed been unavailable, either because

he was actually missing, United States ex rel. Oliver v. Rundle, 298 F.Supp. 392 (E.D.Pa.), aff'd, 417 F.2d 305 (3d Cir.1969), cert.denied, 397 U.S. 1050(1970), or because he was beyond the reach of process. Mancusi v. Stubbs, 408 U.S. 204 (1972). The fact that a witness claims he was available at the time of trial should be entitled to great weight in determining whether the prosecution had used due diligence in finding him. This is especially so where no evidence was submitted either in the state court or in the District Court to controvert the bona fides of the affidavits of the witness and his wife, and where the witness has no interest in the outcome of the case. It was error for the District Court not to have held a hearing at which William and Mary Brown would have testified.

The evidence at the due diligence hearing shows that William Brown was being sought by investigators who did not know how to investigate and by a detective who preferred to conduct his search for a man in the Bronx by remaining in Nassau County (A56). The prosecution's staff were able to locate Brown in 1965 at an address on Park Avenue in Manhattan (A54), but they were out of their depth when they had to go to a Negro section in the Bronx. The inference one derives from

their testimony is that they were uneasy at being in that section of the Bronx and did not prolong their stay. Their location of a Mrs. Brown who told of a husband missing since 1965 was enough to satisfy them, even though the postal records indicated "there were several William Browns at the Bronx address . . ." (A56). One process server tried ringing some doorbells in the apartment building, but apparently lost heart when he found the tenants uncooperative (A57). The detectives' visit to the apartment house in January 1967 apparently did not involve even that much doorbell ringing (A55).

Even at the time of the due diligence hearing in January 1967, the efforts of the prosecution to locate Brown should have been regarded as insufficiently diligent and competent to justify a finding of due diligence. The lack of basis for the finding is strengthened by the affidavits of the allegedly missing witness and of his wife. At the least a hearing should have been held.

POINT IV

The State Court Decisions Do Not Support Denial of Relief

The District Court erred in not holding the decisions

of the state court erroneous as a matter of law. The only opinions written were by the County Court, Nassau County (A42-43, A45-A49), and they may be briefly examined.

The County Court rejected the affidavit of William Brown, quoting People v. White, 309 N.Y. 636, 641 (1956), for the proposition that "Due process does not require a court to accept every sworn allegation as true." The court omitted the next part of Judge Burke's opinion:

> "Many sworn allegations are palpably untrue, not improbable or unbelievable, but untrue. (Taylor v. Alabama, 335 U.S. 252; Foster v. Illinois, 332 U.S. 134.)"

The two Supreme Court cases and People v. White are cases in which documentary evidence vitiated the contentions in the prisoners' affidavits. The case at bar is obviously not such a case. The affidavit of William Brown is not improbable, much less palpably untrue.

The County Court then quoted People v. Howard, 12 N.Y. 2d. 65, 66 (1962), for the proposition that there was "an unmistakable social value in putting an end to litigation at some point . . . ." The proposition cannot be disputed in the context of that case, where defendant's statement, supposedly improperly obtained before trial, was used against

him on the trial, and his lawyer did not object and he did not take an appeal. The Court of Appeals held that a later coram nobis proceeding could not be availed of to correct what, if it were an error, was patent at the trial. The Howard case is not applicable to the case at bar.

The true principle, stated in United States v. Curran, 465 F.2d 260, 262 (7th Cir.1972), is that efficient and expeditious adjudication may not be had at the expense of defendant's right to a fundamentally fair trial.

Appellant's second coram nobis proceeding was strengthened by the affidavit of William Brown's wife (A44). The County Court nevertheless refused to hold a hearing, indulging in what must, with all due respect, be regarded as strained reasoning.

The County Court pointed out that the test was not unavailability vel non, but due diligence, and that the question of due diligence must be determined at the time of the trial (A47). So must every issue in a case -- that is why the trial is held. But if the determination at the trial ends the matter, there would be no basis for the whole doctrine of newly-discovered evidence. So the County Court's argument proves too much.

The cases which the County Court cited to support its statement are inapplicable. In United States ex rel. Oliver v. Rundle, 298 F. Supp. 392 (E.D.Pa.), aff'd, 417 F.2d 305 (3d Cir.1969), cert. denied, 397 U.S. 1050 (1970), the missing witness was a fugitive from justice at the time of the trial, 298 F. Supp. at 394, and was indeed unavailable. In Government of the Virgin Islands v. Aquino, 378 F. 2d 540, 551 (3d Cir. 1967), the Court of Appeals held that the prosecution had not used due diligence in establishing the absence of the complainant at the trial. The opinion leaves it completely unclear where the witness was at the time of trial, and it is hard to understand why the County Court cited this case.

The County Court took the position that, as long as the trial court "conducted a thorough and intensive hearing upon the availability of William Brown" (A47), the matter was at an end: ". . . the prior testimony is admissible and the issue is settled." (A48) This flies in the face of the whole doctrine of newly-discovered evidence. By hypothesis, newly-discovered evidence is available only in cases which, on the basis of the evidence presented originally, were properly decided.

The County Court's attempted rationalization of the failure to find William Brown -- that it "is likely to be frustrating" (A47-A48) to try to find someone with that common name in Negro neighborhood -- is not persuasive, especially when the William Brown in question had a wife at home who knew where he was at all times and when the prosecutor's office had previously been able to find him. After all, the investigators employed by the prosecution ought to have some ability to investigate, and among the facts which investigators have to face are the facts that some last names are very common and their possessors often live in the same neighborhoods.

Of the two cases in the Appellate Division which the County Court cited on the matter of due diligence, one is not in point and the other is contrary to decisions of the Supreme Court of the United States. People v. Lombardi, 39 App. Div. 2d 700, c.1 (1st Dep't 1972), dealt with the unavailability of a witness by reason of her health. A person who is found to be precluded from testifying by reason of sickness is as unavailable as if he were dead. The case has nothing to do with the question of due diligence.

The second case cited, People v. Malcolm, 35 App.

Div. 2d 1037, c. 7 (3d Dep't 1970), is patently erroneous. The court there upheld the use on the trial of testimony given at a preliminary hearing in these circumstances:

> "The record reveals that the witness had left the State several months before the trial and was living in Virginia attending dental school at the time of the trial. His school schedule did not permit him to leave and come to Troy. Under the circumstances, the prosecutor was unable to subpoena him."

In the leading case of Barber v. Page, 390 U.S. 719, 720-1 (1968), the witness whose previous testimony was read at the trial was at the time of trial in prison in a neighboring state, and his schedule did not permit him to leave. The Supreme Court of the United States held that due diligence had not been shown. The witness in the Malcolm case could have been compelled to return from Virginia under the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. N.Y. CPL §§640.10 et seq.; Va.Code §§19.1-269 et seq. (1950).

The County Court concluded its opinion by thoroughly confusing two separate subjects, the due diligence hearing and the trial itself. The County Court stated (A49):

> "There is no indication that if a retrial were ordered and William Brown were called he would change his testimony in any way nor that the outcome of the trial would be affected."

The question at issue was whether the prosecution had used due diligence in attempting to locate William Brown. The affidavits of William Brown and his wife cast the gravest doubt on whether due diligence had been used. If due diligence had not been used, the testimony of William Brown should not have been read to the jury. Without the testimony of William Brown, the outcome of the trial would most likely have been different.

POINT V

The Admission of William Brown's Testimony Deprived Relator of Due Process

One purpose of the confrontation clause is to enable the triers of fact to see and hear the accusing witness so that they may better judge his credibility from his demeanor on the witness stand. Mattox v. United States, 156 U.S. 237, 242-3 (1895). Perhaps the best test of credibility is provided by cross-examination, but cross-examination is not

by itself sufficient to justify the admission of prior testimony unless due diligence is shown in the search for the missing witness.

The District Court stressed the fact that Brown was cross-examined at the preliminary hearing, and appended the transcript of that hearing to its opinion (A17-A32). The cross-examination, such as it was, is beside the point unless the requirement of due diligence is first satisfied. Barber v. Page, 390 U.S. 719, 725-6 (1968):

> "The State argues that petitioner waived his right to confront Woods at trial by not cross-examining him at the preliminary hearing. That contention is untenable. * * *
>
> "Moreover, we would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. * * * The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case."

It was error for the District Court not to have recognized that the proceedings in the state court deprived appellant of his liberty without due process of law.

CONCLUSION

The judgment should be reversed and the writ of habeas corpus granted.

Respectfully submitted

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